ESTATE OF SPEAR

IBIA 72-17 Decided July 18, 1972

Petition by the Bureau of Indian Affairs (Area Director of Billings, Montana) for reopening to determine the heirs of this decedent, and to obtain an order of distribution of the mineral rights in 40 acres of decedent's allotment which accrued to the heirs on March 3, 1971, under the provisions of the Fort Belknap Allotment Act.

Denied.

Indian Probate: Generally

> The Fort Belknap Allotment Act of March 3, 1921 (41 Stat. 1355) and the Acts which it amended are construed in pari materia with each other and with the General Allotment Act of February 8, 1887 (24 Stat. 388, 25 U.S.C. § 331 et seq.) as amended.

Indian Probate: Board of Indian Appeals: Generally

When the Bureau of Indian Affairs petitions for the correction of an error in a probate order issued more than three years prior to the date of petition, the matter may be finally decided for the Department by the Board of Indian Appeals in the exercise of the discretion reserved by the Secretary in 25 CFR 1.2 and delegated to the Board in 43 CFR 4.242(h).

Indian Probate: Indian Reorganization Act: Generally

The Indian Reorganization Act of June 18, 1934 (48 Stat. 985, 25 U.S.C. § 464), under which the tribes of the Fort Belknap Reservation placed themselves by an affirmative vote in the election held for that purpose on October 17, 1934, followed by a constitution approved December 13, 1935, and a charter ratified August 25, 1937, did not enlarge upon but rather it restricted the right of the allottees and their successors to dispose of trust property by will.

Indian Probate: Reopening: Waiver of Time Limitation

When the authority granted to a hearing examiner in 43 CFR 4.242(a) to reopen a decided probate has expired,

the Board of Indian Appeals may consider the matter under 43 CFR 4.242(h), and under the authority delegated there may exercise the Secretary's discretion to reopen, but the petition to reopen will be denied when a full consideration of the record discloses that the original decision contained no error.

Indian Probate: Wills: Generally

The expectancy of title to minerals under an allotment created upon issuance of a trust patent under the Fort Belknap Allotment Act of March 3, 1921 (41 Stat. 1355) is trust property capable of disposition by will.

OPINION BY MR. McKEE

This matter comes before the Board of Indian Appeals upon a petition for reopening filed by the Area Director for the Bureau of Indian Affairs at Billings, Montana. The decedent, Spear, Fort Belknap allottee No. 40, died December 12, 1934, leaving his will dated May 21, 1929, which was approved by the order of the First Assistant Secretary of the Interior on March 13, 1936, Probate No. 1696-36. Although the order approved the will, there was no finding or determination of the decedent's heirs under the Montana laws of descent. Since the order approving the will was entered more than

three years prior to the filing of this petition, it was forwarded by the Hearing Examiner to the Board of Indian Appeals for consideration under 43 CFR 4.242(h). The Examiner indicated that there are twenty cases in which a similar problem exists, but no information concerning the dates of death was furnished.

At the date of his death this decedent was the owner of his own allotment consisting of 400 acres which he had acquired by trust patent dated March 19, 1927, issued under the Fort Belknap Allotment Act of March 3, 1921 (41 Stat. 1355). The identity of the holder of the title to the minerals underlying 40 acres of that allotment described as the NE 1/4 NW 1/4 sec. 21, T. 28 N., R. 23 E., M.P.M., is the subject of doubt in the mind of the Area Director. He is petitioning here for the reopening of this probate for the purpose of obtaining a determination of the heirs of the decedent. The last sentence of section 6 of the Act of March 3, 1921 (41 Stat. 1355) under which the decedent was allotted is as follows:

> * * * That at the expiration of fifty years from the date of approval of this Act the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted or granted lands shall become the property of the individual allottee or his heirs, but the right is reserved to Congress to extend the period within which such reserved tribal rights shall expire. (Emphasis supplied)

Congress took no action to extend the fifty year limitation before it expired March 3, 1971.

The trust patent issued to the deceased included the provision, "Provided that any and all minerals * * * shall remain tribal property, as provided in the said Act." Under the Departmental decision in the Estates of Elaine Looking and George Looking, 68 I.D. 75 (1961), the omission from the patent of any reference to the statutory right to the expectancy in the minerals at the expiration of the 50 years, is not fatal. Additionally the Act specifically provides for the allotment to the Indian of the surface of those lands from which minerals are reserved, and the patent is correct in that respect.

By memorandum of April 30, 1971, a copy of which was attached to the petition for reopening, the Field Solicitor at Billings, Montana, advised the Area Director that section 6 of this Act required a determination of the heirs of this decedent since the minerals reverted to the allottee "or his heirs" at the expiration of the 50 year period, and that the minerals did not pass by the allottee's will to his devisees. By report, the Field Solicitor has also ruled that this limitation in the Act applied only to the original allottees, and that the heirs of an allottee might pass their inherited expectation of title in the minerals by will. This decedent owned no inherited interests.

The ruling of the Field Solicitor would have application in probate of subsequently deceased parties as to the 40 acres of minerals here in question since it is alleged that this decedent's nephew and

apparent sole heir at law, Curly Head, died testate in 1938, and that the devisee named in his will is also deceased, having died prior to March 3, 1971.

It would further appear that the two devisees named by this decedent in his will are still living, and the Field Solicitor appears to have no problem in recognizing their title to 400 acres of surface and 360 acres of mineral rights acquired by them through the will. The rationale for this conclusion escapes us. The Fort Belknap Act supra makes no provision whatever for the devolution, by inheritance or by will, of the title of any allottee who may die after issuance of a trust patent except as it provides for passage of the reserved mineral interests to "his heirs."

We cannot agree with the conclusions reached by the Field Solicitor for the following reasons. The Fort Belknap Allotment Act of March 3, 1921, supra, is in general a continuation of the policy of Congress toward the Indians initiated by the General Allotment Act of February 8, 1887 (24 Stat. 388, 25 U.S.C. § 331 et seq.). Section 5 of that Act provided that upon the approval of the allotment the Secretary should cause patents to issue therefore to the allottees which patents

> * * * shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his

> decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: * * *

This Act was followed almost immediately by the Act of May 1, 1888 (25 Stat. 113), entitled "An Act to Ratify and Confirm an Agreement with the Gros Ventre [of the Fort Belknap Reservation) Piegan, Blood, Blackfeet, and River Crow Indians in Montana and for other purposes." By the Act of 1888, the agreement of February 11, 1887, between the United States and the tribes was ratified and confirmed. Under the agreement large tracts of land were ceded to the United States. Article VI pertaining to the Fort Belknap tribes provided in language almost identical to that in the General Allotment Act that:

> Upon the approval of said allotments by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the Territory of Montana, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. (Emphasis supplied).

Thereafter, by the Act of June 10, 1896 (29 Stat. 321), in section 8 beginning at page 350, a further agreement with the Indians on the Fort Belknap Reservation entered into on October 9, 1895, was ratified. The Act included approval of like agreements with the Indians of other bands and tribes by which additional large tracts were ceded to the United States. The said section 8 of the Act includes the entire Fort Belknap agreement. In Article V of the agreement it is recited that by reason of the scarcity of water on the reservation which rendered the pursuit of agriculture difficult and uncertain, "it is agreed" that until such time as a majority of the adult males of the tribes request it, there shall be no allotments in severalty. The land of the reservation was to be used for grazing purposes by the members of the tribe on a communal basis. In Article VIII it was further provided, "All of the provisions of the agreement between the parties hereto, made February 11, 1887, [Act of May 1, 1888, supra] not in conflict with the provisions of this agreement, are hereby continued in full force and effect."

Thereafter, Congress amended the General Allotment Act by passage of the Act of June 25, 1910 (36 Stat. 855), entitled, "An Act [t]o provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes."

In section 1 of the Act the provision was made for the determination of heirs, not pertinent here except that it did provide,

> That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, * * * (Emphasis supplied).

Section 2 of the Act provided for the first time that an Indian might dispose of his trust property by will:

> That any Indian of the age of twenty-one years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with the rules and regulations to be prescribed by the Secretary of the Interior: * * *. (Emphasis supplied).

Section 2 of the Act of 1910 was amended by the Act of February 14, 1913 (37 Stat. 678, 25 U.S.C. § 373), which is currently effective and which provides in part,

> That any person of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with the regulations to be prescribed by the Secretary of the Interior: * * *.

It is particularly noted that the Act of February 14, 1913, did not repeal the opening sentence of section 1 of the Act of June 25, 1910, supra.

These amendments of the General Allotment Act were by their own terms of general application to the Indians on all reservations and to allotments regardless of date. These Acts must be considered and construed in pari materia with each other, with the General Allotment Act of the Fort Belknap Reservation of March 3, 1921, supra, and with its predecessors of 1888 and 1896, supra.

Construction of special allotment acts in pari materia with the General Allotment Act is necessary in some instances to effectuate the intent of Congress, Kirkwood v. Arenas, 243 F.2d 863 (9th Cir. 1957). The question determined in that case was whether section 5 of the General Allotment Act which provided that upon the expiration of the trust period, the United States would convey the allotment by patent to the Indian or his heirs in fee "* * * discharged of said trust and free of all charge or incumbrance whatsoever: * * *" should be read as a part of the Mission Allotment Act of January 12, 1891 (26 Stat. 712) as amended by the Act of March 2, 1917 (39 Stat. 969). The Mission Acts did not include the above-quoted restrictions contained in the General Allotment Act.

The State of California was asserting an inheritance tax claim against an allotment of a deceased Mission Indian and the Court denied the claim on the ground that the Mission Indian Allotment Acts should be construed in pari materia with the General Allotment Act and held that the lands of the Mission Indians were to be treated and considered under that Act as free from taxation. In reaching its decision the court took note of the Joint Resolution of June 19, 1902 (32 Stat. 744), by the Senate and House of Representatives. The court said in a footnote,

> The United States, in a memorandum brief, calls our attention to a Joint Resolution of June 19, 1902, by the Senate and House of Representatives, which we hold is also persuasive that the two Acts should be construed in pari materia. That resolution states: "Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled 'An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes [General Allotment Act of 1887],' and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto." (32 Stat. 744.)

Felix S. Cohen who is described in Squire v. Capoeman, et ux., 351 U.S. 1 (1956) at page 8 as "an acknowledged expert in Indian Law," stated at page 817 of his writings in Handbook of Federal Indian Law,

> Except for the single act of June 25, 1910 (36 Stat. 855), which constitutes a comprehensive

> revision of the allotment law, all of the significant general legislation of this period [1910 through 1919] is tucked away in provisions of appropriation acts. (Emphasis supplied).

In Cohen's view the Act of 1910 was of general application having prospective effect on existing and on subsequent allotment acts. Section 2 as amended in 1913 would on this basis be effective to give those allotted at Fort Belknap under the 1921 Act the right to make testamentary disposition of their interests in allotments including their expectancy in the titles to the minerals at the end of 50 years.

In the situation here confronting us we find that under the Allotment Act for the Fort Belknap Reservation the minerals reverted to the allottee or his heirs at the end of a period of 50 years, and the Congress did not include the words "or devisee" in such Act. However, it is the conclusion here that the General Allotment Act of 1887, the amendment thereof in 1910, the further amendment thereof in 1913 and the Allotment Acts for the Fort Belknap Reservation should all be construed together.

To do otherwise would place the Indian in an even more untenable position than that which was assigned to him by the Field Solicitor. If a fully strict application of the Act of 1921 is to be undertaken, then upon our interpretation no allottee's interest except the minerals here considered passes by either descent or by will upon his death. Escheat to the tribe or to the United States must be presumed.

The Act does provide for the descent of rights, not interests, of unallotted enrollees who died prior to issuance of the trust patent. It is provided in the second paragraph of section 1 of the Act:

> Notwithstanding the death of any person duly enrolled as herein provided, allotment shall be made in his or her name as though living, the land embraced in such allotment to pass by descent to the legal heirs of the decedent and be subject to disposition as in the case of lands of other allottees passing upon their death. (Emphasis supplied).

This paragraph may well be construed to add a specific extension of the General Allotment Act so that the entitlement of the enrollee would pass either by will or by descent as if a trust patent had already issued. This was a necessary provision under the requirements in the first paragraph that the entire acreage of the reservation should be allotted pro rata, to the enrolled members of the tribes.

Under the Field Solicitor's ruling the surface rights to all of the allottee's 400 acres and the minerals underlying 360 of those acres pass under the decedent's will. We cannot interpret the Act to have this effect.

It is our opinion that Congress did not intend such an incongruous interpretation or application of the Act of 1921, and that therefore the Acts are construed together so that the expectancy of title

to minerals in the 40 acres pass to the devisees named in the will together with all his other trust property.

In view of the foregoing conclusions, it is not necessary to consider the effect which the Indian Reorganization Act of June 18, 1934 (48 Stat. 985, 25 U.S.C. § 464), might have upon these conclusions except for section 4 which includes the following language:

> * * * in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws * * * to any member of such tribe or of such corporation or any heirs of such member: * * * (Emphasis supplied)

This language in our opinion does provide any Indian holding any trust interest on an organized reservation the right to execute a will devising such interest but only to a member of the tribe or to an heir at law.

It is interesting to consider the chronology of events as they occurred. The Act was approved June 18, 1934. Among its other provisions it required that any tribes wishing to come within its scope must hold an election and vote affirmatively to do so. Notice is taken that the tribes on the Fort Belknap Reservation voted affirmatively to do so on October 17, 1934. The decedent died December 12, 1934. The Fort Belknap constitution required by the Act was approved December 13, 1935, and its charter was ratified August 25, 1937. It is unnecessary to decide what date the testator's trust interests, including the expectancy in the minerals, came within the limitations

of the Act, since the devisees named in his will were eligible to take as members of the Fort Belknap Tribes in any event. This is in accord with the Assistant Secretary's order of March 13, 1936, approving the will.

Upon the basis of these conclusions, it is our opinion that a reopening of this estate for the purpose of determining the decedent's heirs under the statutes of descent is not necessary. There being no other reason to determine the decedent's heirs under the laws of descent, the petition to reopen this estate is denied.

This decision is final for the Department.

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David J. McKee, Chairman

I concur:

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Daniel Harris, Member